CONGRESSIONAL REVIEW OF SUSPENSION OF DEPORTATION AND THE DOCTRINE OF SEPARATION OF POWERS

It has long been argued that an alleged conflict exists between the doctrine of separation of powers and the congressional veto. This Comment analyzes Chadha v. INS, *a Ninth Circuit decision which constitutes the most recent attempt by the judiciary to resolve this long-standing issue.* Chadha *involves a challenge to the constitutionality of the congressional review of suspension of deportation as being a violation of separation of powers. The Comment suggests that the time has come for Congress to release its hold on the suspension process. This conclusion is based on an analysis of both practical and constitutional factors. The United States Supreme Court's recent granting of certiorari in* Chadha *indicates the possibility of a final resolution of this issue.*

INTRODUCTION

In 1940 Congress delegated the power to suspend deportation to the Attorney General.[1] Since that time, immigration officials have faced the "impossible task of measuring without scientific instruments the possible pain and suffering aliens would endure if required to depart our shores."[2] Under very limited circumstances, certain undocumented aliens can avoid deportation,[3] but the alien must endure prolonged administrative procedures to obtain suspension.[4] Upon successfully completing the administrative process, the alien has one final hurdle: the express or implied approval of Congress must be obtained to finalize suspension of

1. The Alien Registration Act, ch. 439, § 20, 54 Stat. 672 (1940) (amending the Immigration and Nationality Act of 1917, ch. 29, § 19(c), 39 Stat. 874 (1917)).

2. Wasserman, *Grounds & Procedures Relating to Deportation*, 13 SAN DIEGO L. REV. 125, 137 (1975).

3. *See* notes 11-30 and accompanying text *infra*.

4. *See* 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9(f), at 7-170 (rev. ed. 1981).

deportation.[5]

The final, and at times most critical, step for the alien is avoiding a "congressional veto" of the Attorney General's grant of suspension.[6] In delegating to the Attorney General the power to suspend deportation, Congress retained the right to override any positive grant of relief.[7] The basis for this congressional power is derived from Article I of the Constitution:

> The Congress shall have Power . . . to regulate Commerce with foreign Nations, . . . [and] To establish a uniform Rule of Naturalization . . . [and] to make all laws which shall be necessary and proper for carrying into execution the foregoing Powers.[8]

The constitutionality of the congressional veto has long been questioned.[9] This Comment will attempt to analyze both the theoretical and practical considerations behind this controversial issue. A recent Ninth Circuit decision, *Chadha v. INS*,[10] has attempted to resolve this long standing question.

SECTION 244(C) AND THE PROCESS OF SUSPENSION OF DEPORTATION

Section 244(a)(2) of the McCarran-Walter Act[11] allows suspension of deportation in situations where an alien has committed serious violations of the laws of the United States.[12] The legislative history of section 244 indicates a congressional intent to "ameliorate the hardship caused by deportation."[13] To be eligible for suspension of deportation, an alien must meet three general

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5. The Immigration and Nationality Act, § 244(c), 8 U.S.C. § 1254(c) (1976) [hereinafter cited as I. & N. Act].

6. *Id.* Obtaining relief prior to congressional review is in itself no easy task. One commentator has stated that: "[o]btaining relief has been extremely difficult for the alien because courts have narrowly construed the statutory language . . . . However, a strict construction is incompatible with the ameliorative purpose of the suspension of deportation provision." Comment, *Suspension of Deportation: Illusory Relief*, 14 SAN DIEGO L. REV. 229, 234 (1976).

7. I. & N. Act § 244(c), 8 U.S.C. § 1254(c) (1976); Kwai Chiu Yuen v. INS, 406 F.2d 499 (9th Cir. 1969).

8. U.S. CONST. art. I, § 8.

9. Chadha v. INS, 634 F.2d 408 (9th Cir. 1980). *See* note 38 and accompanying text *infra*.

10. *Id.* The Ninth Circuit in *Chadha* determined that the congressional veto of suspension of deportation decisions was unconstitutional, violating the doctrine of separation of powers.

11. In 1952, Congress adopted the McCarran-Walter Act, ch. 477, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1-1557 (1976)). Section 244 of that Act governs the process of suspension of deportation. Section 244(a)(1) provides for suspension in cases where an alien has committed "minor" violations of the laws of the United States. I. & N. Act § 244, 8 U.S.C. § 1254 (1976).

12. Crimes involving moral turpitude, e.g., anarchy and prostitution. *See* I. & N. Act § 241(a), 8 U.S.C. § 1251(a), for a complete list under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), and (18).

13. For a summary of the legislative history of this provision, see Comment, *supra* note 6, at 233 n.35.

requirements: physical presence within the United States for a specified number of years; proof of good moral character; and a showing of extreme hardship if deported.[14] Satisfaction of these requirements only entitles the alien to "apply" for suspension; the granting of relief is discretionary.

Suspension of deportation involves a long and tedious process.[15] An application for suspension must be made before an immigration judge at the initial deportation hearing.[16] The burden is on the applicant to show that he has met eligibility requirements.[17] The immigration judge must make two separate determinations. First, the judge must determine, as a question of law, whether the statutory prerequisites have been met.[18] Next, the judge must exercise discretion in determining whether to grant suspension.[19] Congress granted the Attorney General broad discretion in allowing the immigration judge to consider the equities presented.[20]

If the immigration judge decides against suspension, the alien may appeal within ten days to the Board of Immigration Appeals.[21] If the appeal for suspension is denied, the alien may seek other remedies, including judicial review.[22] If suspension is granted, either by the immigration judge or on appeal, one final

14. I. & N. Act § 244(a), 8 U.S.C. § 1254 (1976).

15. *See generally* 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9(f), at 7-170 to -177 (rev. ed. 1981).

16. *Id.* § 7.9(f)(1), at 7-170. *See* 8 C.F.R. 242.17(a), (d) (1980); Foti v. INS, 375 U.S. 217, 222 (1963); Yick Chin v. INS, 386 F.2d 935 (9th Cir. 1967).

17. 8 C.F.R. § 242.17(d) (1980); Kimm v. Rosenberg, 363 U.S. 405 (1960). Upon meeting the burden, the alien's case then proceeds on the merits. McLeod v. Peterson, 283 F.2d 180, 184 (3d Cir. 1960).

18. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9 (rev. ed. 1981).

19. Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1956); Jay v. Boyd, 351 U.S. 345, 354 (1956); Roberts, *The Exercise of Administrative Discretion under the Immigration Laws*, 13 SAN DIEGO L. REV. 144 (1975).

20. Jay v. Boyd, 351 U.S. 345, 361 (1956) (Warren, C.J., dissenting); Comment, *Discretion under the Immigration Laws: May the Attorney General Adopt Rules or Must He Follow the "Crooked Code" of the Ad Hoc Proceedings?*, 1972 UTAH L. REV. 294.

21. 8 C.F.R. § 242.21 (1981); 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9(f)(2), at 7-172 (rev. ed. 1981).

22. The alien has three options: (1) seek reversal from the Attorney General, (2) attempt to have a private immigration bill passed by Congress, or (3) appeal to the circuit court in his jurisdiction. The Attorney General's unfavorable action is subject to judicial review even though Congress has the final word in granting suspension of deportation. McGrath v. Kristensen, 340 U.S. 162 (1950); Wong Wing Hang v. INS, 360 F.2d 715 (2d Cir. 1966). *See* Comment, *How to Immigrate to the*

step must occur—congressional approval.[23] The constitutionality and practicality of this final step has been both criticized and defended over the years.

Section 244(c) outlines two different procedures for obtaining congressional approval.[24] If suspension is granted for common grounds of deportation, it is final unless either house of Congress acts by resolution to veto the decision.[25] If suspension is granted despite more aggravated grounds for deportation the affirmative approval of both houses of Congress by concurrent resolution is required.[26] Section 244(c)(1) orders that upon suspension "a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to Congress with the reasons for such suspension."[27] In practice, grants of suspension are referred to the Judiciary Committee of the respective house

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United States: A Practical Guide for the Attorney, 14 SAN DIEGO L. REV. 193, 232 (1976).

23. I. & N. Act § 244(c), 8 U.S.C. § 1254(c) (1976).

24. *Id.* Section 244(c) provides as follows:

> (1) Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.
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> (2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—
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> if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.
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> (3) In the case of an alien specified in paragraph (2) of subsection (a) of this section—
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> if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

25. *Id.* § 244(c)(2), 8 U.S.C. § 1254(c)(2).

26. *Id.* § 244(c)(3), 8 U.S.C. § 1254(c)(3).

27. *Id.* § 244(c)(1), 8 U.S.C. § 1254(c)(1).

for review and recommendation.[28]

The lack of meaningful review at the congressional level has led one commentator to state that "the consideration by Congress of the suspension is perfunctory and without debate, with Congressmen apparently content to rely on the recommendations of the judiciary committees, which in turn, rely upon the views of their immigration subcommittees."[29] Such "circular" review needlessly involves congressional committees in hundreds of deportation cases which have already been extensively examined.[30]

From a practical standpoint, congressional review of suspension of deportation decisions adds nothing to the proceeding. After the Attorney General has exercised his discretion to suspend deportation, it becomes superfluous to later superimpose the discretion of a small group of Congressmen. Any abuse of discretion by the Attorney General is already subject to judicial review.[31]

In 1980 the House of Representatives passed a bill which would have eliminated congressional review from the suspension process.[32] The bill, known as H.R. 7273, was part of the "Carter effi-

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28. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9(f)(4), at 7-174 (rev. ed. 1981).

29. Maslow, *Recasting Our Deportation Law*, 56 COLUM. L. REV. 309, 345 (1956).

30. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9(f)(4), at 7-174 (rev. ed. 1981).

31. In 1953, the President's Commission on Immigration and Naturalization described the process of congressional review of suspension of deportation:

> In immigration matters, in particular, it frustrates proper administration and puts a premium on extraneous considerations in the determination of legal rights. The exercise of discretion according to standards fixed by Congress is peculiarly an executive function. The legislature is not equipped and not intended to be equipped, to handle the details of administration.

PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME 214 (1953).

32. H.R. REP. NO. 7273, 96th Cong., 2d Sess. 45 (1980) provides:

> Section 9(a) of the bill eliminates the requirement of a report to Congress on the grant of suspension of deportation by the Attorney General. Under the current section 244 of the Act, in most cases where suspension is granted by the Attorney General, Congress has the option of disapproving that grant. In more serious cases, the Attorney General's grant of suspension of deportation requires an affirmative act of approval by the Congress. The Department of Justice has taken the position that the current law's provision for a 'one-House veto' of executive action is unconstitutional. A case involving that issue is currently pending in the Ninth Circuit Court of Appeals. Chadha v. INS, Civ. No. 77-1702, 9th Cir. As a practical matter, suspension of deportation can be granted only following a hearing by an immigration judge, and the statutory criteria applied are quite strict. The Department strongly recommends the deletion of the

ciency package" to eliminate procedures that served little purpose in comparison to their cost in time and money.[33] Despite favorable reports by the Senate Judiciary Committee, the bill failed in the Senate by a small margin.[34] The narrow defeat of H.R. 7273 demonstrates that even Congress has grave doubts about the value of its review of suspension decisions.

THE DOCTRINE OF SEPARATION OF POWERS AND THE CONGRESSIONAL VETO

In *Chadha v. INS*,[35] the Ninth Circuit found the one-house congressional veto[36] of suspension to be unconstitutional as a violation of the doctrine of separation of powers. Before analyzing the Ninth Circuit's approach, a preliminary examination of the doctrine of separation of powers is required.

The status of the doctrine was best summarized by Professor Kenneth Culp Davis:

> Both the words and the history of the Constitution leaves largely open the question whether a theory of separation of powers is embodied in the Constitution, and, if so, what that theory shall be. What the Supreme Court has said and done about the theory has differed from time to time, and at no time has it made the theory into a fixed or unalterable principle. Each generation, within limits, can fabricate its own theory of separation of powers.[37]

The number of commentators who have struggled with the doctrine and reached opposite theoretical conclusions demonstrates

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provisions relating to congressional action on suspension of deportation cases.

See also 58 INTERPRETER RELEASES 7 (1981).

33. H.R. REP. No. 7273, 96th Cong., 2d Sess. 1 (1980). Compare also the dissenting view of Congressman Henry J. Hyde:

> I believe that Sec. 9 of H.R. 7273 amending Sec. 244(c) of the Immigration and Nationality Act is ill-advised and detrimental to the plenary power over immigration granted to the Congress. . . .
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> In the 94th and 95th Congresses, the Congress reviewed a total of 508 cases and disapproved 11 cases submitted under Sec. 244(a)(1) and disapproved all 13 cases submitted under Sec. 244(a)(2).
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> The rationale for this amendment presumably is to relieve the Immigration and Naturalization Service of the task of submitting complete and detailed statements to Congress, as well as to relieve the Congress of having to review each case and process legislation in accordance with the present provision. . . .
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> I cannot help but feel that the congressional action presently required on these cases acts as a deterrent to the number of applications received by the Attorney General for relief under this section of the law. Eliminating this requirement by giving the Attorney General complete discretion in each of these cases could lead to diverse interpretations and possibly a diminution of the standards applied in the past.

Id. at 96-97.

34. 57 INTERPRETER RELEASES 589 (1980).

35. 634 F.2d 408 (9th Cir. 1980).

36. I. & N. Act § 244(c)(2), 8 U.S.C. § 1254(c)(2) (1976).

37. 1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 2:6, at 75 (2d ed. 1978).

the confusion in this area of constitutional law.[38]

Because the Constitution makes no mention of the doctrine of separation of powers,[39] the Supreme Court's open-ended interpretations provide the only basis for discussion. The Supreme Court examined the doctrine in the landmark decision of *Youngstown Sheet & Tube Co. v. Sawyer*.[40] In that case, Justice Jackson emphasized that although the Constitution delegated power to the three branches, its purpose was to integrate the dispersed powers into a workable government.[41] Other decisions analyzing the doctrine of separation of powers have held that the doctrine is "inherent" in the first three articles of the Constitution.[42]

In essence, the doctrine of separation of powers arose out of a perceived need to prevent overreaching by any branch of government. As the Supreme Court stated in *Buckley v. Valeo*:[43] "The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny."[44] James Madison summarized the framers' thoughts, writing that "when

38. J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION (1964); Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogative*, 52 IND. L.J. 323 (1977); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1952); Dixon, *The Congressional Veto and Separation of Powers: The Executive on A Leash?*, 56 N.C.L. REV. 423 (1978); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. LEG. 735 (1979); Javits & Klein, *Constitutional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 435 (1977); McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1970); Schwartz, *The Legislative Veto and the Constitution*, 46 GEO. WASH. L. REV. 351 (1978); Note, *Congressional Veto of Administrative Action: The Probable Result of A Constitutional Challenge*, 1976 DUKE L.J. 285 (1976); Note, *Constitutionality of the Legislative Veto*, 13 HARV. J. LEG. 593 (1976). *See also* Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators*, 41 CALIF. L. REV. 565 (1953); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

39. Atkins v. United States, 556 F.2d 1028, 1067 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1978).

40. 343 U.S. 579 (1952).

41. *Id.* at 635 (Jackson, J., concurring).

42. Nixon v. Administrator of Gen. Services, 433 U.S. 425 (1977); Springer v. Philippine Islands, 277 U.S. 189 (1928); Myers v. U.S., 272 U.S. 52 (1926).

43. 424 U.S. 1 (1976).

44. *Id.* at 121. The Court went on to state: "But they likewise saw that a her-

the legislative and executive powers are united in the same person or body, there can be no liberty."[45] Regardless of the doctrine's origin, the Supreme Court has recognized it as an element of constitutional law.[46]

No viable attempt has been made to resolve the alleged conflict between the doctrine of separation of powers and the congressional veto. The Supreme Court has chosen not to interpret the doctrine's effect on the legislative veto.[47] The Supreme Court's silence is not due to lack of opportunity. The Court has managed to avoid the issue by either denying certiorari or by deciding cases on other grounds.[48] A recent example is *Buckley v. Valeo*[49] where several congressional veto provisions in the Federal Election Campaign Act Amendments of 1974[50] were challenged on separation of powers grounds. The Supreme Court chose to find the provisions unconstitutional on other grounds,[51] in effect sidestepping the legislative veto question.

In his concurring opinion in *Buckley*, Justice White alone addressed the constitutionality of the congressional veto from a separation of powers standpoint.[52] He concluded that the legislative veto did not violate the doctrine of separation of powers.[53] Justice White's analysis was based on the assumption that "[failing to veto a regulation] no more invaded the President's powers than does a regulation not required to be laid before Congress."[54] As Judge MacKinnon pointed out in *Clark v. Valeo*,[55] however, this statement is merely a play on words and denies reality. Even in those situations where no congressional veto occurs, Congress has acted affirmatively to allow that result.[56] Whether criticized

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metic sealing off of the three branches of government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Id.*

45. THE FEDERALIST No. 47 (J. Madison) at 324-26 (J. Cooke ed. 1961).

46. Nixon v. Administrator of Gen. Services, 433 U.S. 425, 441-46 (1977); Buckley v. Valeo, 424 U.S. 1, 118-24 (1976).

47. Chadha v. INS, 634 F.2d 408 (9th Cir. 1980).

48. Buckley v. Valeo, 424 U.S. 1 (1976); Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1978).

49. 424 U.S. 1 (1976).

50. Pub. L. No. 93-443, 88 Stat. 1263 (1974).

51. The Supreme Court found that Congress was unconstitutionally attempting to share the executive power of appointment. Congress had provided for congressional appointment of four out of six members of the commission. *Id.*

52. 424 U.S. at 245-85 (White, J., concurring in part and dissenting in part).

53. "The provision for congressional disapproval of agency regulations does not appear to transgress the constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure or the legislation has been passed over his veto." Buckley v. Valeo, 424 U.S. at 286.

54. 424 U.S. at 245-85 (White, J., concurring in part and dissenting in part).

55. 559 F.2d 642, 685-90 (D.C. Cir. 1977).

56. *Id.* Professor McGowan states:

Whether or not the congressional veto ultimately is deemed constitu-

or supported, Justice White's concurrence has little precedential value. The view of only one Supreme Court Justice is hardly indicative of how the entire Court will respond to the issue in the future.

The last major federal court decision involving the constitutionality of the congressional veto was *Atkins v. United States*.[57] In *Atkins*, the Court of Claims sustained a one-house veto provision contained in the Federal Salary Act of 1977.[58] The Supreme Court denied certiorari.[59] Under the Salary Act the President recommended executive, legislative and judicial salaries which could be vetoed by either house of Congress.[60] The *Atkins* court, in a four to three decision, emphasized the competency of Congress to examine simple salary figures and determine their appropriateness.[61] The court noted that the President and Congress had merely switched roles in the process of salary structure.[62]

It is important to note that *Atkins* was decided on extremely narrow grounds. The court stated that, "[w]e are not to consider, and do not consider, the general question of whether a one-house veto is valid as an abstract proposition, in all instances, across-the-board, or even in most cases."[63] The court held that this particular one-house veto passed the test of "common sense and inherent necessities of the governmental coordination."[64] The language in *Atkins* is important because of its apparent conflict with the recent *Chadha* decision.[65] The *Atkins* court emphasized that "[t]he President's salary proposals, even when they become

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tional, its validity cannot be convincingly supported by the approach in these quoted lines. The approach is not responsive to the way the congressional veto operates in practice, for it does not recognize that the influence over prospective regulations created in key members of Congress by the mere existence of the veto provision may permeate the administrative process.

McGowan, *supra* note 38.

57. 434 U.S. 1009 (1978).

58. Pub. L. No. 95-19, 91 Stat. 45 (codified at 2 U.S.C.A. §§ 358-60 (West Supp. 1979)).

59. 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1978).

60. *See* note 58 *supra*.

61. Atkins v. United States, 556 F.2d 1028, 1059 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1978).

62. *Id.* at 1065.

63. *Id.* at 1059.

64. *Id.*

65. Chadha v. INS, 634 F.2d 408 (9th Cir. 1980). The loose language in *Atkins* led Professor Dixon to write: "The opinion, however, is so loosely structured that selective quotation from it could yield some support for an across-the-board vali-

law, do not order or regulate any person, either actually or potentially."[66] This implies that there may be times when Congress may not be competent to make the final decision due to its effect on individual rights. An obvious example of this situation is suspension of deportation. After only brief review, Congress is allowed to deport an individual despite contrary administrative and judicial findings.

Any conclusions drawn from an analysis of precedent are at best speculative. Two commentators recently argued that:

> Discussion of precedent eventually becomes a mere recitation of the traditional separation of powers themes of control and conflict. Since the relevant cases . . . cite a history that is incomplete and an intent of the framers that is in fact unascertainable, both critics and supporters of the congressional veto can find support for their argument.[67]

It becomes apparent that by creatively interpreting precedent the congressional veto can be found either constitutional in all cases or, on the opposite extreme, unconstitutional in all cases.

Uncertainty in this area of the law may tempt future courts to adopt one of the extreme positions. The wisdom of adopting either extreme must be closely scrutinized. Instead of relying on abstract constitutional principles, the congressional veto must be analyzed from a practical standpoint. The benefits of legislative review should be balanced against the interference caused by such review in each case. Any future analysis adopted by the Supreme Court should avoid the temptation of a per se adoption of either extreme.

An analysis of why Congress chooses to retain the power to veto is essential for a rational understanding of the constitutional issue. The framers did not realize the need for, nor did they foresee, the development of administrative agencies.[68] The tremendous growth of government over the years necessitated the delegation of congressional power to independent agencies. Some authors view this growing delegation to agencies as inevitable.[69] In addition, they view the legislative veto as a simple and logical method of controlling "Congress' own creation."[70] Others argue to the contrary that "the availability of the legislative veto encour-

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dation of the congressional veto." Dixon, *The Congressional Veto and Separation of Powers: The Executive on A Leash?*, 56 N.C.L. REV. 423, 474 (1978).

66. 556 F.2d 1028, 1059 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1978). The court went on to state that: "[t]he recommendations do not affect the rights of others, require them to do anything, impose any obligations on them, or restrict any pre-existing rights or privileges of anyone other than those whose pay is thereby established."

67. Miller & Knapp, *supra* note 38, at 384.

68. *See* Abourezk, *supra* note 38, at 329.

69. Henry, *supra* note 38, at 737.

70. *Id.*

ages ill-considered legislation."[71] Congress may avoid making extensive public policy judgments in the early consideration of a measure because the power to correct by veto is retained.[72] Despite the conflict of opinion, provisions allowing for congressional veto are increasing, apparently with the approval of the Supreme Court.[73]

To what extent does congressional review serve a useful purpose? Many commentators believe the congressional veto as currently used unduly hampers agencies that were created by Congress to perform delegated duties.[74] Professor Dixon forcefully stressed that "[t]he difficulty with use of the congressional device over the administration of the government is that it goes beyond the oversight function per se and becomes an intermeddling activity with serious implications for responsible and orderly policy development."[75] In suspension of deportation cases, congressional judicial committees make the actual determination in recommendation form.[76] In practice, Congress has been accused of intervening selectively and without any specific guidelines.[77] It is unfortunate that a decision with potentially grave consequences for an individual cannot practically be given the courtesy of review by the entire Congress.

In contrast with the ineffectiveness of congressional review, the administrative process clearly enhances the fairness of suspension proceedings. Federal regulations require certain procedural safeguards.[78] An alien is given the opportunity to present evidence during the hearing.[79] The decision of the special inquiry of-

71. *Id.* at 761.

72. *Id.* "The legislative veto is, at best, an ad hoc and illusory remedy for institutional problems which Congress and the Courts have created since the New Deal." *Id.*

73. Schwartz, *supra* note 38, at 357-59. Veto provisions "have been included in federal legislation at least 183 times in 126 different acts of Congress in the last 43 years." H.R. REP. No. 1014, 94th Cong., 2d Sess. 14 (1976).

74. Miller & Knapp, *supra* note 38.

75. Dixon, *supra* note 38.

76. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9(f)(4), at 7-174 (rev. ed. 1980).

77. Dixon, *supra* note 38.

78. 8 C.F.R. § 242.17(a), 242.8(a) (1980). "The hearing before the special inquiry officer, including the testimony, exhibits, applications and requests, the special inquiry officer's decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings shall constitute the record in the case." *Id.* § 242.15.

79. *Id.* § 242.18. Formal enumeration of the findings is not required.

ficer must include a discussion of the evidence and findings.[80] In addition to the due process protections available to the alien at the administrative level, the option of judicial review is always present.[81]

It has been argued that the congressional veto is necessary to control agencies to which Congress has no option but to delegate broad powers.[82] The primary purpose of the congressional veto is to increase the political accountability of agencies and attempt to assure consistency with congressional intent.[83] The legislative veto may accomplish this even when not exercised. Its mere presence may dissuade any administrative overreaching.[84] While this argument is undoubtedly valid under certain circumstances, it may be inapplicable in other situations. When Congress overturns the grant of suspension, the immigration judge is not informed of the reasons for reversal. It is difficult to believe that an immigration judge, arriving at a decision without any congressional guidance, is restrained by the veto possibility.

The history of the doctrine of separation of powers has always been one of accommodation.[85] In 1930, Justice Frankfurter warned that enforcement of a rigid conception of separation of powers would make modern government impossible.[86] Overlap between the branches may be necessary and advisable under certain circumstances. Nevertheless, in those situations where congressional vetoes go beyond general oversight and become burdens on the administrative process, they should be struck down. If Congress does not have the institutional capacity to provide more than a "perfunctory" review, it should release its hold on the process. This stage has been reached in suspension of deportation procedure.

CHADHA V. INS

In *Chadha v. INS*[87] the Ninth Circuit invalidated section 244(c)(2),[88] which allows one house of Congress to veto a grant of suspension of deportation. The immigration judge at the lower-level hearing had exercised his discretion to suspend the deportation of Jagdish Chadha. The judge found that Chadha met the re-

80. 445 F.2d 1362, 1365 (9th Cir. 1971).
81. *See* note 22 *supra*.
82. Abourezk, *supra* note 38.
83. *Id.*
84. *Id.*
85. Clark v. Valeo, 559 F.2d 642, 650 n.10 (D.C. Cir. 1977).
86. F. FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 78 (1930).
87. 634 F.2d 408 (9th Cir. 1980).
88. I. & N. Act § 244(c)(2), 8 U.S.C. § 1254(c)(2) (1976).

quirements of section 244(a)(1): he had resided in the United States for over seven years, established good moral character, and demonstrated extreme hardship if deported.[89] The House of Representatives acted to disapprove the suspension of Chadha's deportation.[90] Chadha petitioned the Ninth Circuit,[91] challenging the constitutionality of the legislative veto provision.[92]

The *Chadha* court set forth its interpretation of the doctrine of separation of powers. The court found that the framers established the doctrine to serve a two-fold purpose: to prevent any branch of government from assuming more than its share of power,[93] and to facilitate administration of a growing nation.[94] The court recognized that while perfect autonomy of the branches is the ideal, it is not possible in a functioning government. The end result is that courts are forced to interpret separation of powers questions pragmatically.[95]

The *Chadha* court also established a two-pronged standard of review to be applied in considering separation of powers issues. First, the court outlined the parameters of a separation of powers violation: one branch may not assume powers that are "central or essential" to the operation of a coordinate branch.[96] Second, the assumption of power must not disrupt the performance of duties by a coordinate branch unless it is necessary to implement a legitimate governmental policy.[97] If these two conditions are not met, the action of the branch is unconstitutional.

The court then applied this standard of review to the legislative veto of suspension of deportation. According to the Ninth Circuit, the legislative veto could serve only three possible purposes: to correct judicial or executive misapplication of the statute, to jointly administer the statute on an ongoing basis, and to provide a residual legislative power in defining substantive rights under the law.[98] The court held that any attempt by Congress to correct misapplication of law would be an infringement on the adminis-

89. *Id.* § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1976).
90. H.R. RES. 926, 94th Cong., 1st Sess., 121 Cong. Rec. 40,800 (1975).
91. *See* I. & N. Act § 106(a), 8 U.S.C. § 1105(a) (1976).
92. *Id.* § 244(c)(2), 8 U.S.C. § 1254(c)(2) (1976).
93. Chadha v. INS, 634 F.2d 408, 422 (9th Cir. 1980).
94. *Id.* at 423.
95. *Id.* at 425.
96. *Id.*
97. *Id.* Nixon v. Administrator of Gen. Services, 433 U.S. 425, 443 (1977).
98. Chadha v. INS, 634 F.2d 408, 429 (9th Cir. 1980).

trative and judicial process.[99] The court noted with concern that the decision of Congress was not controlled by any procedural constraints. Furthermore, there are no "provisions for review of Congress' legal or factual conclusions."[100] The court could find no reason why judicial review of the Attorney General's discretion would not be adequate.[101]

The Ninth Circuit also rejected the idea of joint administration of the suspension statute. The court stated that over time the Executive gained "skill and expertise" in administering the statute. Congressional interference upsets the balance of consistent administration.[102] Congress is obviously not attempting to alter future conduct by the Executive. If this were the intent, congressional vetoes of suspension would include an explanation of where the Executive erred. This is rarely the case.

The assertion that Congress has a right to create substantive immigration law was rejected by the Ninth Circuit on two grounds. First, the court held that the right to make laws does not include the right to overturn a long line of administrative decisions.[103] Second, the court did not find sufficient procedural compliance by the legislative review process.[104] The court, finding these two points to be decisive, did not address the third point.

The *Chadha* court only mentions *Atkins* in passing,[105] without attempting to distinguish the decision. This is surprising as the decisions are easily distinguished. The standard of review in *Chadha* could have been applied to the facts in *Atkins* to arrive at the identical result reached there by the Court of Claims. The difference would be in the balancing of equities. The Ninth Circuit could also have emphasized the fact that *Atkins* was expressly limited to its facts.[106] Because both *Atkins* and *Chadha* emphasize practical considerations, the fact that opposite conclusions

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99. *Id.* at 430. The court stated: "By reason of the congressional disapproval device, nearly all judicial interpretations of the criteria in Section 244 are rendered, in effect, impermissible advisory opinions."

100. *Id.*

101. *Id.*

102. *Id.* at 432.

103. *Id.* at 434.

104. *Id.* The court stated:

> The article I authorization to make law does not permit positive law which alters the substantive legal rights of individuals to be enacted by a mere executive recommendation, which is not a final exercise of specifically delegated power to alter these legal rights, followed by legislative inaction—an inaction that could equally imply endorsement, acquiescence, passivity, indecision, or indifference.

105. *Id.* at 435 n.41.

106. Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1978).

were reached is not entirely inconsistent.[107]

Undoubtedly, the Ninth Circuit intentionally wrote a very broad opinion. By limiting the decision in *Chadha* to its facts, the Ninth Circuit could have avoided the possibility of Supreme Court reversal. By choosing to adopt a broad standard of review, the Ninth Circuit filled an important gap in both immigration and constitutional law. The time had come to establish guidelines for reviewing the constitutionality of congressional vetoes on a broader scale.

IMPLICATIONS OF *CHADHA*

It is well established that the doctrine of separation of powers has never been a fixed or unalterable principle.[108] The Supreme Court has never ruled on whether the congressional veto violates the doctrine of separation of powers.[109] The congressional veto is quickly becoming a common feature in federal legislation. Clearly, a decision must be made on the constitutionality of congressional vetoes across the board. In *Chadha* the Supreme Court once again has the opportunity to make such a determination. The Supreme Court has granted certiorari in *Chada* and is in a position to resolve this long-standing conflict.[110]

The standard of review in *Chadha* could be used to attack hundreds of existing congressional veto provisions. The decision would undoubtedly have a chilling effect on future use of the veto. Nevertheless, it is important to remember that the standard of review in *Chadha* is flexible. It is not a per se invalidation of all legislative vetoes. For a violation to occur, one branch must assume a central or essential power of another branch, and the assumption must infringe on the duties of the coordinate branch unnecessarily. The net effect of *Chadha*'s flexible standard of review is to substantially augment the need for judicial review. Although the long-term effect of *Chadha* is uncertain, the potential for a greater judicial role is present. The role of judicial discretion inevitably increases when the courts are asked to apply such a flexible standard.

Those congressmen who oppose the removal of legislative re-

107. *Id.*
108. 1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 2:6, at 75 (2d ed. 1978).
109. *Id.*
110. 634 F.2d 408, *cert. granted* 50 U.S.L.W. 3211 (U.S. Oct. 6, 1981) (80-1832).

view from suspension decisions wish to preserve the congressional mandate over the process.[111] The fact that the 94th and 95th Congresses reviewed only 521 cases over a four year period and disapproved only 24[112] is not impressive from a numerical standpoint. What these congressmen fail to realize in their bureaucratic computations is that twenty-four individuals suffered the hardship of deportation under a very questionable decision-making process. The impact on human lives cannot be measured numerically. It may be wise for Congress to recall the legislative intent of ameliorating hardship of deportation instead of focusing on the desire to retain control over immigration matters.

CONCLUSION

Suspension of deportation has been described as an illusory promise of relief.[113] As far back as 1953, the President's Commission on Immigration and Naturalization argued that "the authorities administering the law should have sufficient discretion to enable them to take humanitarian considerations into account."[114] The Ninth Circuit decision in *Chadha v. INS*[115] is a positive step toward a more rational system of suspension. The purpose behind the suspension statute is to "ameliorate hardship and injustice which otherwise would result from a strict interpretation of the law."[116] Congress is not equipped to evaluate, nor should it have the final voice in evaluating, the humanitarian considerations necessary to equitably decide these cases. To continue to

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111. *Supra* note 33.

112. *Id.* Under § 244(a)(1) Congress reviewed 508 cases and disapproved 11 while disapproving all 13 cases submitted under § 244(a)(2).

113. Comment, *Suspension of Deportation: Illusory Relief*, 14 SAN DIEGO L. REV. 229, 256 (1976) (citing Wadman v. INS, 329 F.2d 812 (9th Cir. 1964)):

> In construing section 244 we are in an area in which strict construction is peculiarly inappropriate. The apparent purpose of the grant of discretion to the Attorney General is to enable that officer to ameliorate hardship and injustice which otherwise would result from a strict and technical application of the law. A strict and technical construction of the language in which this grant of discretion is couched could frustrate its purpose. A liberal construction would not open the door to suspension of deportation in cases of doubtful merit. It would simply tend to increase the scope of the Attorney General's review and thus his power to act in amelioration of hardship.

Wadman v. INS, 329 F.2d 812, 816-17 (9th Cir. 1964).

114. PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME 213 (1953).

115. 634 F.2d 408 (9th Cir. 1980).

116. Wadman v. Immigration & Naturalization Service, 329 F.2d 812, 816-17 (9th Cir. 1964).

foster Congress view of its own power at the expense of hardship to individuals like Jagdish Chadha would be tragic.

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